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No. 99-2090

Supreme Court, U.S.
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In The

Supreme Court of the United States

VESSEL MY GIRLS AND JOHN N. SINGLETON,
Petitioner,

v.

MARINA MANAGEMENT SERVICES, INC.,
DBA JAMES CREEK MARINA,
AS AGENT FOR MIF REALTY L.P.,
Respondents.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Benjamin B. Klubes
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Washington, D.C. 20005-2111
(202) 371-7000

Robert A. Weber
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
Wilmington, DE 19899-0636
(302) 651-3000

Counsel for MIF Realty L.P.

2699

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's sanctioning of Petitioner by dismissal of counterclaims that the District Court found were "legally deficient" and "designed primarily to harass" and delay resolution of the case?

2. Whether the court of appeals properly remanded the action pursuant to Fed. R. Civ. P. 17(a) for the real party in interest to consent, to ratify or be substituted into the action?

3. Whether the court of appeals properly found that Petitioner was bound by his counsel's representation to the district court?

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Respondent MIF Realty L.P. is a Delaware limited partnership whose partnership interests are not publicly traded. The general partner of MIF Realty L.P. is MIF GEN-PAR L.P., a Delaware limited partnership. The limited partner of MIF Realty L.P. is the Federal Deposit and Insurance Corporation, as successor to the Resolution Trust Corporation. Publicly-traded companies which may have an interest in the outcome of this matter by way of direct or indirect interests in MIF GEN-PAR L.P. include General Electric Company and Goldman Sachs, Inc.

Respondent MIF Realty L.P. has moved in the district court to be substituted in this matter for respondent Marina Management Services, Inc., and accordingly requests that this Opposition be accepted as the Respondent's Opposition to the Retention. Should the Court deny the motion for substitution, MIF Realty L.P. requests that the court accept this Opposition as an *amicus curiae* Opposition.

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MARINA MANAGEMENT SERVICES, INC.,
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BRIEF OF RESPONDENT IN OPPOSITION

Petitioner asks that this Court review the court of appeals decision that the district court properly dismissed his counterclaims pursuant to Rule 11, Fed. R. Civ. P. Respondent respectfully submits that there is no basis for review of the court of appeals' conclusion that the district court did not abuse its discretion when the lengthy record before the district court supported its findings that the counterclaims were "legally deficient" and "designed primarily to harass" in a litigation over a $7,663.21 debt for boat dock fees -- an action that the court characterized in a written order as "breathtak-

ing" in its "lack of civility and *ad hominem* attacks." Further, Petitioner requests that this Court review the court of appeals' determinations that: (i) the action be remanded so that the real party in interest could consent to, ratify, or seek to substitute itself into the action; and (ii) that a statement to the district court by Petitioner's counsel may bind Petitioner. These requests are unwarranted. Initially, Petitioner's request is moot because the real party in interest does not wish to prosecute this action further. Respondent has filed in the district court a motion to substitute itself as plaintiff as the real party in interest, and then dismiss all plaintiff's claims in this action. Substantively, there is no basis for this Court's review because the court of appeals decision to remand for consent, ratification or substitution of the real party in interest is in perfect accord with the governing Federal Rule of Civil Procedure. Further, the law is well-settled that a representation by counsel to a court may bind the client, and thus there is no reason for this Court to review that issue. Accordingly, the Petition should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 202 F.3d 315. The memorandum decision and orders of the district court (Pet. App. 48a-57a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 11, 2000, and denied motions for rehearing and rehearing en banc on March 29, 2000. The petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1) was filed on June 26, 2000.

STATEMENT

1. The James Creek Marina (the "Marina") is located along James Creek in southwestern Washington, D.C. on land owned by the federal government. (Pet. App. 2a). The Marina is operated pursuant to a concession from the United States National Park Service (the "Concession"), which in 1994 was held by Washington D.C. Associates, a limited partnership (the "First Concessioner"). (Pet. App. 6a). Thereafter, the First Concessioner filed a voluntary petition in bankruptcy in the United States Bankruptcy Court for the District of Columbia. *Id.* Respondent MIF Realty L.P. ("MIF"), then the holder of a mortgage on the Marina, subsequently acquired the First Concessioner's rights to operate the Concession. *Id.* Marina Management Services, Inc. ("MMS") manages the Marina as the property manager for MIF. Among the duties conferred upon MMS pursuant to a written agreement between MIF and MMS is the duty to collect unpaid fees owed by licensees of the Marina.

2. From the Spring of 1994 through mid-1997, Petitioner John N. Singleton ("Singleton" or "Petitioner") moored at the Marina his 34-foot recreational vessel My Girls (the "Vessel"). The genesis of this case is Singleton's extended -- and undisputed -- failure to pay monthly mooring and related fees. (Pet. App. 3a, 98a-102a).

3. At the time that Singleton brought the Vessel to the Marina in the spring of 1994, he entered into an agreement governing the mooring use of the Marina (the "Marina License Agreement"). (Pet. App. 2a-3a). The Marina License Agreement required that Singleton pay a monthly fee as a condition of mooring his boat at the Marina. *Id.* The Marina License Agreement also provided that rate could change, without notice, to a much higher "transient" or daily rate if Singleton should default thereunder. *Id.* Although there is some disagreement as to whether the Marina License Agreement was extended formally beyond its initial 12-month term, it is undisputed that Singleton continued to moor the Vessel at the Marina until mid-1997.

4. MMS initiated suit before the district court on March 3, 1997, relying upon the district court's admiralty jurisdiction under 28 U.S.C. § 1333(1) and 46 U.S.C. § 31342 and federal question jurisdiction under 28 U.S.C. § 1331. The initial complaint filed by MMS listed James Creek Marina as plaintiff. The district court subsequently determined that the Marina was not a legal entity entitled to bring suit in its own name and granted MMS leave to amend its complaint to reflect a proper plaintiff. *See James Creek Marina v. Vessel My Girls*, 964 F. Supp. 20, 21 (D.D.C. 1997). (Pet. App. 25a-31a). MMS subsequently filed an amended complaint listing Marina Management Services, Inc. "dba James Creek Marina, as agent for MIF Realty L.P." as plaintiff. (Pet. App. 79a-80a). MMS sought in its complaint to impose a maritime lien upon the Vessel and procure its arrest pursuant to 46 U.S.C. § 31342 and Admiralty Rule E(5)(a), and sought an *in personam* money judgment against Singleton. *Id.* After an initial hearing, the district court ordered the arrest of the Vessel (Pet. App. 23a-24a), and fixed a bond amount so that Singleton could procure its release by posting such amount with the clerk of the court. (Pet. App. 25a-31a). The district

court later reduced the bond amount after ruling that MMS had improperly overstated Singleton's debt by utilizing the higher "transient," or daily, rate, notwithstanding that MMS had invoiced Singleton at the lower monthly rate. (Pet. App. 32a-36a). After the bond amount was lowered, Singleton posted the required amount and obtained the release of the Vessel. (Pet. App. 37a-38a).

5. After MMS had filed its amended complaint, Singleton filed an amended answer in which he asserted counterclaims and sought damages, costs and legal fees. (Pet. App. 88a-97a). Three of Singleton's counterclaims directly related to or arose out of the litigation of this case. In his first counterclaim, Singleton claimed that certain items of personal property were missing from the vessel when it was released to him after he posted bond. (Pet. App. 92a-93a). Singleton's fourth counterclaim asserted a "wrongful seizure" claim arising from (i) MMS's alleged failure to be registered to do business in the District of Columbia at the time of suit, and (ii) MMS's purportedly wrongful refusal to accept $4,000 as full satisfaction to his debt. (Pet. App. 95a-96a). Singleton's fifth counterclaim accused MMS of abusing the judicial process by intentionally overstating the amount due at the time of the arrest of the Vessel. (Pet. App. 96a-97a). Singleton's two remaining counterclaims concerned statements allegedly made by MMS to third parties. Singleton alleged that MMS had falsely stated to third parties that Singleton had engaged in certain criminal activities while present at the Marina, and that he had also failed to pay for the mooring of the Vessel. (Pet. App. 93a-95a). Singleton asserted that these alleged statements gave rise to causes of action against MMS for defamation and interference with prospective contractual relations. *Id.*

6. The district court ordered MMS on July 7, 1997 to provide an explanation for MMS's alleged overstatement of the amount of its claim. Specifically, the district court required MMS's counsel to "show cause in writing under oath . . . as to why sanctions should not be levied against [MMS] and its counsel for having misled the Court." (Pet. App. 36a). After reviewing the responses submitted by both parties, the district court entered an order in February, 1998 reprimanding both counsel for their "breathtaking" "lack of civility and *ad hominem* attacks." (Pet. App. 41a-42a). The February order also noted that Singleton's "counterclaims, which threaten to delay the immediate resolution of a case involving admittedly unpaid boat dock fees, appear to be mostly fraudulent and designed primarily to harass. *See* Rule 11, Fed. R. Civ. P." *Id.* The February order concluded by warning that unless counsel for the parties reached some agreement and withdrew the "offending pleadings," the case would be referred to a special master to investigate and recommend appropriate sanctions, including the referral of counsel to the district court's Grievance Committee. *Id.*

7. No pleadings were withdrawn. In August, 1997, MMS moved for summary judgment on its claims. In January 1999, the district entered judgment against Singleton in the amount of $7,663.21. (Pet. App. 48a-49a). In the same ruling, the district court also sanctioned both parties, explaining that "[b]oth counsel have engaged in name-calling, personal attacks and petty arguments, and have burdened the Court with repetitions of arguments already rejected." (Pet. App. 52a). The district court sanctioned MMS and its counsel by reducing MMS' requested award of attorney fees by approximately $20,000. (Pet. App. 51a-52a). The district court sanctioned Singleton by dismissing his remaining counterclaims. (Pet. App. 52a-53a). The court explained its reasoning as follows:

> Defense counsel has filed counterclaims that appear frivolous and designed primarily to harass and delay a final resolution of this case. For the reasons discussed in its Order of February 9, 1998, these counterclaims will be dismissed. *See* Rule 11(b)(1), Fed. R. Civ. P. . . . . Defendant has announced its consent to dismissal of the fourth of the five counterclaims (for wrongful seizure of the vessel) . . . . The second counterclaim (defamation) and the fifth counterclaim (abuse of process) are deficient because of their integral relationship to the legitimate pursuit by plaintiff of this lawsuit. Finally, when viewed in the context of the petty and niggling conduct of counsel for both parties, all of the counterclaims should be seen as designed primarily to harass. All five counterclaims therefore are properly dismissed under Rule 11 of the Federal Rules of Civil Procedure.

(Pet. App. 52a-53a).

8. The court of appeals reversed the district court's summary judgment decision. (Pet. App. 7a-9a). Pursuant to Fed. R. Civ. P. 17(a), the court of appeals remanded the case to the district court so that MMS could establish consent to or ratification of the commencement of the case by MIF, the apparent real party in interest, or so MIF could be substituted as the plaintiff. *Id.* The court of appeals reversed the sanctions awarded against MMS and its counsel, finding that the record did not establish that the overstatement of MMS' claim had resulted from intentional misrepresentation. (Pet. App. 10a-18a).

9. The court of appeals, however, sustained the dismissal of Singleton's counterclaims. (Pet. App. 18c-20c). Noting that the "central purpose of Rule 11 is to defer baseless filings in district court," the court of appeals, reviewing for abuse of discretion, held that

> The record supports the district court's finding that the counterclaim for abuse of process was legally deficient because of its close connection with a good faith action for recovery of a debt. *See Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1996); *Croixland Properties Ltd. Partnership v. Corcoran*,174 F.3d 213, 215 (D.C. Cir. 1999). So too, the district court could reasonably conclude that Singleton's defamation claim, which included allegations not necessarily integrally linked to the legitimacy of the debt recovery action, nonetheless was "designed primarily to harass" in view of "the petty . . . conduct of counsel for both parties . . .," as were his counterclaims for property damage and for intentional interference with contractual relations. Marina Management presented multiple affidavits calling into serious doubt Singleton's property damage claim. Without weighing the merits, this peek at the evidence, *cf.*, *e.g.*, *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997); *Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1521 (D.C. Cir. 1989), confirms that given the contentious history of this unduly prolonged litigation, *see McLaughlin v. Bradlee*, 803 F.2d 11197, 1205-06 (D.C. Cir. 1986), the district

court did not abuse its discretion. (Pet. App. 19a-20a).

REASONS FOR DENYING THE WRIT

1. The court of appeals did not err in affirming the dismissal of Singleton's counterclaims.

The standard of appellate review of a district court's award of sanctions pursuant to Fed. R. Civ. P. 11 is very deferential, and is limited to a determination of whether such sanctions constitute an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Here, the court of appeals found that the district court acted well within its discretion in sanctioning Singleton for asserting improper and frivolous counterclaims. The court of appeals based its decision on its review of the findings made by the district court. (Pet. App. 19a-20a). The decision does not warrant further appellate review by this Court.

Dismissal of a party's claim or counterclaim is an appropriate, albeit a severe, sanction for violations of Rule 11. Fed. R. Civ. P. 11, advisory committee notes (1993) (Supp. 2000) (rule specifically contemplates award of non-monetary sanctions "that may have collateral financial consequences upon a party, such as *dismissal of a claim*, preclusion of a defense, or preparation of amended pleadings.") (emphasis added). Sanctions under Rule 11 involving dismissal of a party's claims are frequently upheld. *See, e.g., Carman v. Treat*, 7 F.3d 1379, 1382 (8th Cir. 1993); *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488-489 (9th Cir. 1991); *Rhineheart v. Stauffer*, 638 F.2d 1169, 1171 (9th Cir. 1979).

Petitioner claims that the district court's findings were wholly inadequate to support the sanction of dismissal. (Pet.

19-28). Petitioner's argument is belied, however, by the record of this case and by the cases upon which Petitioner relies. In its February 9, 1998 order, the district court advised Petitioner that his counterclaims "threaten[ed] to delay the immediate resolution of a case involving admittedly unpaid boat dock fees [and] *appear to be mostly fraudulent and designed primarily to harass*." *See* Rule 11, Fed. R. Civ. P." (Pet. App. 41a-42a) (emphasis added). This statement is tantamount to a finding that the counterclaims had been interposed "for an[] improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). Petitioner took no significant action in response.

Eleven months later, in the context of ruling upon MMS's summary judgment motion, the district court dismissed the counterclaims. (Pet. App. 52a-53a). The district court explained its dismissal sanction by repeating its prior observation that the counterclaims had been interposed for inappropriate purposes -- to delay the collection of an admittedly-owed debt and to harass -- and that such counterclaims appeared frivolous. (Pet. App. 52a-53a). The district court also had substantial evidence with respect to the nature of the claims provided in affidavits filed in various pleadings relating to summary judgment. (Pet. App. 19a-20a). The district court specifically found that two counterclaims were deficient because of "their integral relationship to the legitimate pursuit by plaintiff of this lawsuit" and all counterclaims were "designed primarily to harass" and thereby delay the resolution of a case involving "admittedly unpaid boat dock fees." (Pet. App. 53a). Petitioner's own authority demonstrates that no additional specificity is required. *See Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994) (district court need only identify "the sanctionable conduct and the authority for the sanctions.")

(quoting *Coltrade International, Inc. v. United States*, 973 F.2d 128, 132 (2d Cir. 1992)).

The district court's sanction of dismissal of the counterclaims is also proper when viewed as an exercise of the court's inherent power to "fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991) (awarding $1.1 million in attorney fees for improper conduct). Dismissal is plainly within the scope of the court's inherent powers. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (dismissing plaintiff's lawsuit for abusive conduct).

It is also clear that the district court properly considered less drastic measures before issuing its dismissal order. In the February, 1998 order, the district court explained that the court was considering referring the question of sanctions to a special master for further review and the possible referral to the court's Grievance Committee. *Id.* Petitioner's response to the court's warning was to withdraw one of his five counterclaims, on the theory that the same relief was provided by one of the remaining counterclaims, and to continue to pursue the remaining counterclaims. (Pet. 24). Petitioner also had ample opportunity to be heard as to why his counterclaims might not warrant sanctions. *See Merriman v. Security Inc.*, 100 F.3d 1187, 1192 (5th Cir. 1996) (upholding Rule 11 sanctions where sanctioned attorney failed to request hearing on sanctions during two-year period between granting of sanction, and determination of appropriate award). The court of appeals properly concluded that the district court's sanction was not an abuse of discretion, in light of the record regarding the legal deficiencies and improper purpose of those counterclaims and "the contentious history of this unduly prolonged litigation." (Pet. App. 20a). Accordingly, no further review of this conclusion is necessary.

2. Petitioner's issues with respect to Plaintiff's claims are moot.

The Petition also seeks this Court's review of the court of appeals remand of the case to the district court to permit MMS to establish MIF's consent to or ratification of the commencement of the case, or to substitute MIF as plaintiff, because an agent, rather than real party in interest, might be able to continue the litigation as a result of ratification. The Petition further seeks review of the court of appeals' determination that Petitioner was bound by his counsel's assertion with respect to the length of the contract at issue. Both issues are moot in light of the filing of a motion with the district court which seeks to substitute MIF as the real party in interest with respect to the debt at issue, and then dismiss the allegations against Petitioner. In so doing, MIF is taking the very step which Petitioner would have this Court require by order - *i.e.*, force MIF to become a party, rather than ratify or consent to MMS' action.[1] Finally, by seeking to dismiss the action, the issue regarding a statement by the Petitioner's counsel becomes irrelevant.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1969) (quotations omitted). See *also Mills v. Green*, 159 U.S. 651, 654 (1895). The instant case presents a classic "voluntary cessation" situation, in that the real party in interest with respect to the plaintiff's claim, MIF, seeks to be substituted as the plaintiff in respect of such claim and

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[1] The Petition does not take issue the court of appeals' decision that remand is appropriate to permit substitution of the real party in interest.

dismiss the same, thus eliminating any threat of such claim's revival in the future. *Cf. City of Erie v. Pap's A.M.*, __ U.S. __, 120 S. Ct. 1382, 1390, 146 L. Ed.2d 265, (2000) (mootness lacking because the City of Erie had a continuing interest in determining the constitutionality of its ordinance, and there remained a reasonable possibility of future prosecutions thereunder).

3. The court of appeals did not err in remanding the case to establish MIF's consent or ratification.

Even if the issue of the decision of the court of appeals to remand the case is not moot, the decision is fully consistent with Rule 17(a), Fed. R. Civ. P., and does not conflict with any decision of this Court or any other court of appeals. (Pet. 11-12). Accordingly, no further review is not warranted.

Rule 17 of the Federal Rules of Civil Procedure states, in pertinent part, that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed after objection for ratification of the commencement of the action by*, or joinder or substitution of, *the real party in interest* . . . ." Fed. R. Civ. P. 17(a) (emphasis added). The court of appeals agreed with Singleton's Rule 17(a) argument that MMS is not the real party in interest with respect to the debt owed by him for mooring and related fees at the Marina. The court of appeals properly remanded the case to permit MMS to establish MIF's consent or ratification, or to substitute MIF as the real party in interest, in accord with Rule 17(a).

Petitioner contends that ratification alone is never appropriate, because it would improperly permit an agent to continue an action in the name of its principal. (Pet. 11-12). However, the cases Petitioner cites on this point do not stand

for the proposition for which they are offered. In *Airlines Reporting Corp. v. S&N Travel, Inc.*, 857 F. Supp. 1043 (E.D.N.Y. 1994), *aff'd*, 58 F.3d 857 (2d Cir. 1995), the Second Circuit reached the exact opposite conclusion: "*ARC is a 'real party in interest' in the sense that this action may properly be maintained in ARC's name*, see Fed. R. Civ. P. 17(a) (defining real parties-in-interest to include those parties with whom or in whose name a contract has been made for the benefit of another) . . ." 58 F.3d at 861, n.4 (emphasis added). The precise issue decided in *Airlines Reporting Corp.* was whether the citizenship of the agent was dispositive for diversity jurisdiction purposes under 28 U.S.C. § 1332(a). *Id.* at 864. Likewise, in *Hanna Mining Co. v. Minnesota Power & Light Co.*, 739 F.2d 1368, 1370 (8th Cir. 1984), the court of appeals *refused* to decide the issue on appeal concerning Rule 17, and instead explicitly limited its ruling to whether federal jurisdiction was barred by the Johnson Act. In *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (D. La. 1953), *aff'd*, 210 F.2d 653 (5th Cir. 1954), the district court dismissed (and the Fifth Circuit affirmed, in a three-sentence opinion) a suit where the plaintiff was found to be a straw party for another person that was manipulating the litigation to further a fraudulent scheme.

None of these cases undermine the decision of the court of appeals in this case, and none of them establish a conflict among the circuits. In fact, at least five circuits have published decisions which permit ratification of the commencement of a case by a non-party who is also the real party in interest. *See, e.g., Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc.*, 620 F.2d 1, 4 (1st Cir. 1980); *Icon Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 478 (3d Cir. 1987); *Associated Ins. Mgmt. Corp. v. Arkansas Gen. Agency, Inc.*, 149 F.3d 794 (8th Cir. 1998); *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712 (9th

Cir. 1992); *Integon Life Ins. Corp. v. Browning*, 989 F.2d 1143, 1153-1154 (11th Cir. 1993). No circuit court has adopted a conflicting rule. In remanding the case to permit MMS to establish MIF's ratification or consent, the court of appeals followed the plain language of Rule 17(a) and the interpretations of these other circuits.

The court of appeals' decision is also fully consistent with well-established admiralty principles. As this Court stated in *Houseman v. Cargo of The Schooner North Carolina*, 40 U.S. 40, 49 (1841), "we consider it as well-settled in admiralty proceedings, that the agent of absent owners may libel either in his own name, as agent, or in the name of his principals, as he thinks best." This venerable admiralty doctrine remains the law today. *See Prevor-Mayorsohn Caribbean, supra*, 620 F.2d at 4; *Aunt Jemima Mills Co. v. Lloyd Royal Belge*, 34 F.2d 120, 122 (2d Cir. 1929); *The Nichiyo Maru*, 89 F.2d 539, 543 (4th Cir. 1937); *Marathon Int'l Petroleum Supply Co. v. I.T.I. Shipping, S.A.*, 766 F. Supp. 130, 135 (S.D.N.Y. 1991), *Junior Gallery, Ltd. v. Neptune Orient Line, Ltd.*, 1997 WL 26293, at *4 (S.D.N.Y. 1997); *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1184 (Fla. Dist. Ct. App 1985). Although neither the district court nor the court of appeals relied upon this rationale, such authority constitutes an independent legal basis upon which the court of appeals might properly remand the case. Accordingly, further review of the court of appeals' decision is not warranted.

4. The court of appeals properly refused to permit Singleton to disavow a representation made to the district court by his counsel.

There is substantial uniformity in the law that ordinarily, a concession or representation of counsel *will* bind a

client, even if the attorney is mistaken. *See, e.g., City of Wichita v. Southwestern Bell Tel. Co.*, 24 F.3d 1282, 1288 (10th Cir. 1994); *Dehsara v. Gustafson*, 1991 U.S. App. LEXIS 10122, 3 (9th Cir. May 8, 1991); *Burgin v. Broglin*, 900 F.2d 990, 998 (7th Cir. 1990); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 748 (D.C. Cir. 1998). In this case, Singleton's counsel advised the district court that the parties had extended the Marina License Agreement in June, 1996. At oral argument before the court of appeals, Singleton's counsel sought to retract his representation, asserting that he had been mistaken. The court of appeals ruled that Singleton was bound by his attorney's concession:

> Singleton's attorney informed this court at oral argument that he was mistaken in representing to the district court that the parties' agreement had been extended in June 1996. His change of position comes too late: having conceded the fact of extension in the district court, he cannot alter the record now.

(Pet. App. 9a). The court of appeals relied in part on *Yesudian*, *supra*, in refusing to permit Singleton's counsel to retract this admission. This decision (which is neither distinguished nor even discussed in the Petition) is in accord with the decisions of other courts of appeals noted above. Therefore, further review of the decision below on this issue is not warranted.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

Benjamin B. Klubes
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000

Robert A. Weber
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
Wilmington, DE 19899-0636
(302) 651-3000

Counsel for MIF Realty L.P.

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